expects to issue a ruling by 5:00 p.m., October 4, 1996. SWB agreed in open court to withhold disclosure of the customer information to SWBCS or SBC until that time.

MCI learned only recently that SWB was about to disclose MCI's confidential and proprietary customer information to SWBCS or its parent SBC. Consequently, MCI notified SWB of its objections to such disclosure and has filed this suit and brings this motion, seeking the same injunctive relief sought by AT&T to assure that MCI's confidential customer billing information is also protected from disclosure.

II.
Factual Background

MCI is a telecommunications carrier that provides long distance (interexchange) telecommunications services in Texas, Oklahoma, Arkansas, Missouri and Kansas.[2] Defendant SWB is a Bell Operating Company and is the local exchange company ("LEC") providing local exchange telecommunications services within the same 5-state area. SWBCS is a new affiliate of SWB, created to enter the long distance market in competition with MCI and other long distance carriers. SBC is the parent of SWB and SWBCS.

In 1988, MCI and SWB entered into the "Agreement for the Provision of Billing and Collection Services Between Southwestern Bell Telephone Company and MCI Telecommunications Corporation for Invoice Ready" (the "Billing Agreement").[3] The Billing Agreement provides that SWB will bill and collect from MCI's customers the charges due for long distance services used by MCI's customers. In order for SWB to provide these billing and collection services, the agreement calls for MCI to provide

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[2] In support of this motion, MCI submits the affidavits of Dan Arnett and Judy Levine, which are Tabs A and B, respectively, to the Appendix submitted in support of this motion.

[3] Relevant portions of the Billing Agreement are attached as Exhibit 1 to the Arnett Affidavit.

SWB with proprietary customer information that includes, among other things, the identity of the customer, the duration, time of day, and the number called, and the rates to be charged. Arnett Aff., ¶ 5. The customer information has been compiled and organized at great costs to MCI and represents valuable information to MCI for market analysis and business strategy purposes. Arnett Aff., ¶¶ 5-8. Consequently, MCI treats such information as its proprietary, confidential information, and the Billing Agreement contains explicit provisions that limit SWB's use of MCI's information solely for billing and collection purposes and prohibits SWB from disclosing such information to third parties. Arnett Aff., ¶ 9-10 and Exhibit 1 thereto.

SWB has launched a campaign to provide MCI's proprietary customer information to its long distance affiliate, SWBCS, so that SWBCS can use that information in its marketing efforts to compete with MCI. This is the same postcard campaign that provoked the AT&T Suit. SWB or its affiliate have mailed postcards to SWB's customers, many of whom are also MCI's customers, requesting them to authorize SWB to release their past six months long distance bills to SWBCS. Arnett Aff., ¶ 21-27. These postcards have been sent to customers throughout Texas and the four neighboring states. SWB or SWBCS have received approximately 20,000 postcards in response to its campaign. By letter dated September 9, 1996, SWB notified MCI that it intended to turn over customer information relating to 100 of the postcards it has compiled. Arnett Aff., ¶ 29. By letter dated September 19, 1996, MCI notified SWB that it objected to any such disclosure and considered any disclosure to be a breach of the parties' Billing Agreement. *Id.*

III.
Argument and Authorities

Because the issues have been fully briefed by AT&T and SWB in the AT&T Suit, MCI will not repeat AT&T's arguments at length but states simply that MCI's position is virtually identical to that of AT&T, with the exception of certain provisions in MCI's contract with SWB that differ from

AT&T's contract. MCI will note those differences in section A.2. below. With the exception of these contractual differences, the legal arguments urged by AT&T in the AT&T Suit apply with equal force to MCI's claims against SWB and its affiliates here. Consequently, for the sake of efficiency, MCI will merely summarize those arguments below and adopts without restating in full the entirety of AT&T's arguments in support of its request for preliminary injunctive relief and in opposition to SWB's motion for summary judgment in the AT&T Suit.[4]

A. **Likelihood of Success on the Merits**

As in the AT&T Suit, MCI is likely to succeed on the merits of establishing three grounds for relief: (i) defendants' violation of provisions of the Telecommunications Act of 1996, 47 U.S.C. § 222(a) and (b), (ii) SWB's breach of the Billing Agreement, and (iii) the defendants' misappropriation of MCI's trade secrets.

1. Violation of the Telecommunications Act of 1996. The Telecommunications Act of 1996 (the "1996 Act") protects MCI's confidential, proprietary information from disclosure by SWB and prohibits SWB from using the confidential information for marketing purposes. 47 U.S.C. § 222(a) and (b). Congress enacted these provisions at the same time that it passed provisions to allow local

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[4] For the Court's convenience, MCI has included in its appendix to this Motion the relevant motions and briefs of the parties to the AT&T Suit (exclusive of their exhibits and supporting affidavits and deposition transcripts), which are as follows:

C. AT&T's Memorandum of Authorities in Support of Motion for Temporary Restraining Order;
D. Defendants' Motion for Summary Judgment;
E. AT&T's Response to Defendants' Motion for Summary Judgment;
F. Defendants' Reply to AT&T's Response to Motion for Summary Judgment;
G. AT&T's Motion for Preliminary Injunction;
H. AT&T's Response to Defendants' Reply to AT&T's Response to Defendants' Motion for Summary Judgment; and
I. Letter dated September 16, 1996 as Reply to AT&T's Response to Defendants' Reply to AT&T's Response to Defendants' Motion for Summary Judgment.

exchange carriers, such as SWB, to begin competing in the long distance market, and, conversely, to allow long distance providers, such as MCI, to begin competing for local telephone service. Recognizing that local carriers such as SWB could abuse the proprietary information in their possession due to arrangements such as the parties' Billing Agreement, Congress enacted safeguards to protect the confidentiality of such information and to prevent one carrier from using for marketing purposes the information received from another carrier. Section 222(a) imposes upon a telecommunications carrier the duty to protect the confidentiality of another carrier's proprietary information. 47 U.S.C. § 222(a). Section 222(b) requires a carrier to use proprietary information received from another carrier only for providing the specific telecommunications services which are the subject of the agreement and prohibits its use for marketing purposes. 47 U.S.C. § 222(b).

By providing MCI's billing information to its long distance affiliate, SWB is violating 47 U.S.C. § 222. But for the Billing Agreement, SWB would not possess the long distance information regarding MCI's customers. The electronically compiled and sorted data of MCI's customers' long distance usage is proprietary to MCI, prepared at substantial expense to MCI and treated as strictly confidential by MCI. Such proprietary information is protected by Section 222(a) and (b) and may be used only for billing and collection purposes by SWB and not for marketing purposes. The defendants' use of MCI's information under the terms of the postcard campaign is a clear violation of the 1996 Act.

2. Breach of Contract. The conduct of SWB also constitutes a breach of its contractual obligations under the Billing Agreement. MCI and SWB entered into the Billing Agreement so that SWB could provide billing and collection services for MCI. Billing Agreement, Recitals and Section I "Purposes of this Agreement," at pp. 4-5; Arnett Aff., ¶ 11-17. The information provided by MCI to SWB for billing and collection services is proprietary information. Billing Agreement,

Exhibit K, ¶ 1 and 2; Schedule 1 to Exhibit K; Arnett Aff., ¶¶ 18-20. The party receiving proprietary information, here SWB, agrees to:

> put in place and strictly enforce (using all of its prerogatives, including appropriate disciplinary action or termination of employment of its employees or agents) procedures to assure that its employees or agents are aware of and fulfill the obligation under this Exhibit K to hold the Disclosing Party's [MCI's] Proprietary Information in confidence.

Exhibit K, ¶ 3.a. It further provides that SWB will hold MCI's proprietary customer information in confidence, treat it with the same care it treats its own proprietary information, not disclose it to third parties, and use it only as agreed, i.e. for billing and collection purposes. *Id.* at ¶ 3.b. As further protection, SWB must notify MCI of any demand for disclosure received from a third party under legal process and, before any disclosure, must cooperate with MCI in seeking protection from disclosure. *Id.* at ¶ 3.d.

In the AT&T Suit, SWB argues that its agreement with AT&T permits SWB to disclose the confidential customer billing information of AT&T if the customer authorizes disclosure, citing ¶ K(2)(b) and ¶ K(3)(f) of AT&T's agreement. See Defendants' Motion for Summary Judgment, Tab D, at p. 9. MCI's Billing Agreement has no similar provisions. There is no permitted disclosure in response to a customer request in ¶ 3.d. to Exhibit K of MCI's agreement, the parallel to AT&T's ¶ K(2)(b). Nor do the provisions of MCI's Exhibit K, ¶ 4.f., the parallel to AT&T's ¶ K(3)(f), make an exception for release by written authorization of the "owner." Instead, MCI's Billing Agreement only permits disclosure upon written authorization of the "Disclosing Party," here MCI. Thus, there is no contractual provision in MCI's Billing Agreement that expressly exempts MCI's customer billing information from the obligation of confidentiality merely because a customer purportedly authorizes its release.

The Billing Agreement expressly limits SWB's use of MCI's customer information for billing and collection purposes only and prohibits SWB from providing it to anyone other than MCI. SWB's stated intention to disclose the very information MCI provided to SWB only by virtue of the Billing Agreement under the strictures of confidentiality constitutes a breach of the Billing Agreement.

3. Misappropriation of MCI's Trade Secrets. SWB's and its affiliates' conduct also amounts to a misappropriation of MCI's trade secrets. MCI has demonstrated the requisite elements of this tort: (1) the existence of a trade secret; (2) acquisition of the trade secret through a breach of a confidential relationship or by improper means; and (3) use of the trade secret without authorization of the plaintiff. *Phillips v. Frey,* 20 F.3d 623, 627 (5th Cir. 1994); *see also Taco Cabana Intern. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir. 1991).

Courts consistently afford trade secret protection to customer information. *See, e.g., Zoecon Industries v. American Stockman Tag Co.*, 713 F.2d 1174, 1176 (5th Cir. 1983); *Miller Paper Co. V. Roberts Paper Co.*, 901 S.W.2d 593, 601 (Tex. App. -- Amarillo 1995, no writ). MCI's confidential customer information is clearly a trade secret. MCI expends significant resources in developing and processing extensive amounts of data regarding the long distance use of MCI's customers -- valuable data that it carefully guards as confidential. Arnett Aff. ¶ 4-10. Such information is the very sort of information that a company involved in the long distance market would desire because it allows a company to target the most profitable customers, and, accordingly, companies spend significant amounts of money for information of less marketing value. Levine Aff., ¶ 4-11.

Equally clear is that MCI's trade secrets were acquired through a breach of a confidential relationship. By virtue of the Billing Agreement, SWB gained access to MCI's proprietary information and is required to maintain it as confidential. By soliciting MCI's customers to request SWB to release

MCI's confidential information to SWB's affiliate and then turning over such information to SWB's affiliate, SWB has breached its confidential relationship with MCI.

Finally, as to the third element, MCI has not authorized the use of its customer billing information for any purpose other than billing and collection and has objected to its disclosure. Arnett Affidavit, ¶ 21-29. In sum, MCI has shown a substantial likelihood of success on the merits of its trade secrets claim.

B. **MCI Will Suffer Irreparable Injury If An Injunction Is Not Granted**

MCI will be irreparably damaged if its sensitive customer information, developed over many years and through the expenditure of substantial sums of money and other resources, is provided to its soon-to-be competitor, SWBCS. Courts routinely hold that use or disclosure of confidential customer information causes irreparable harm and enjoin such conduct. *Molex, Inc. v. Nolen*, 759 F.2d 474, 478 (5th Cir. 1985); *Zoecon, supra*, 713 F.2d at 1180; *Picker Intern., Inc. V. Blanton*, 756 F.2d 971, 980-81 (N.D. Tex. 1990).

C. **The Balance of Harm Weighs Strongly in Favor of an Injunction**

As noted above and in the Arnett and Levine affidavits, MCI will suffer significant competitive harm if its trade secrets are disclosed to its future competitor. SWBCS will not suffer significant injury if an injunction issues, but will be placed in the very same position as all long distance providers, by having to develop its marketing information in the same manner and from the same sources as MCI and other long distance carriers. On the other hand, denying an injunction will result in the release of MCI's trade secrets to its competitor, giving SWBCS an unfair advantage, which the courts have consistently recognized is impossible to redress with monetary damages. The balance of harm thus favors an injunction.

D. **The Public Interest Will Not Be Disserved by an Injunction**

Finally, the public interest will not be disserved by the entry of an injunction. The public has an interest in seeing that contracts are honored, and the injunction will also further Congress' intentions as stated in 47 U.S.C. §§ 222(a) and (b). Nothing in the requested injunction will prevent SWB from asking customers to mail SWB a photocopy of their bill or from conducting a customer survey. Accordingly, the public interest will not be disserved by the entry of injunctive relief.

IV.
Conclusion

For the reasons stated above, MCI respectfully urges the Court to enter a preliminary injunction prohibiting defendants from disclosing MCI's confidential, proprietary information or otherwise misappropriating MCI's proprietary information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of September, 1996, a true and correct copy of the foregoing was served upon the following counsel by hand delivery:

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William B. Steele III

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
	)	
Implementation of Section 601(d) of the Telecommunications Act of 1996, and Sections 222 and 251(c)(5) of the Communications Act of 1934	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	
Requests of Bell Atlantic-NYNEX Mobile, Inc., and U S West, Inc. for Waiver of Section 22.903 of the Commission's Rules	)	

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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October 3, 1996

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SUMMARY

The Commission should retain its policy of requiring that the Bell Operating Companies (BOCs) may only provide cellular services through structurally separate corporations. It should decline to adopt its proposals to eliminate that requirement and to employ instead nonstructural safeguards to be implemented through transitional mechanisms. The Commission's structural separation requirement was established to protect against improper subsidization of BOC wireless services by their monopoly wireline services, to ensure equitable interconnection arrangements for competing wireless carriers, and to facilitate the detection and deterrence of anticompetitive conduct. These fundamental public interest concerns will continue to apply to the BOCs' provision of cellular services for the foreseeable future, given the BOCs' continuing monopoly control over local exchange services and the slow pace at which personal communications service competition will evolve. Because the factual predicate for the structural separation requirement has not changed since the Commission originally adopted it, there is no public interest basis for the Commission to reverse course and now repudiate that policy.

Moreover, the Commission should not "sunset" its structural separation requirement -- under either its "Option 1" or "Option 2" transition plan -- before there is shown to be significant competition in the local exchange and CMRS markets. The

Commission should, instead, wait and see whether the Section 271 requirements are accomplishing their goal of establishing conditions conducive to the development of local competition. Withdrawing the structural separation safeguard before such meaningful competition exists would thwart the very competition in local exchange and CMRS services that the Commission is seeking to encourage.

Irrespective of whether it eliminates the structural separation requirement, in considering amending Section 22.903(a) of its Rules, the Commission should not permit BOC cellular affiliates to own or use landline facilities for the provision of in-region interLATA service if those affiliates are also going to provide any type of landline local exchange services. BOC provision of in-region landline interLATA service is governed by Sections 271 and 272 of the Communications Act, and the Commission should not allow the BOCs to circumvent those requirements, through their cellular subsidiaries, "competitive landline local exchange" affiliates, or any other vehicle.

Moreover, the Commission should prohibit BOC cellular affiliates from providing one-of-a-kind volume discounts to their affiliated BOC telcos. This practice would give the BOCs free license to engage in discriminatory and anticompetitive conduct that would undercut the Commission's efforts to promote competition in the provision of CMRS services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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To: The Commission

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), pursuant to Section 1.415 of the Commission's Rules, submits these Comments in response to the Commission's Notice of Proposed Rulemaking (NPRM), FCC 96-319 (rel. Aug. 13, 1996), in the above-captioned proceeding.

I. INTRODUCTION

The Commission proposes to eliminate, under two alternative timetables,[1] the requirement in Part 22 of its Rules that the Bell Operating Companies (BOCs) may only provide cellular services through structurally separate corporations, and it suggests possible transition mechanisms and nonstructural safeguards to replace its current requirement. MCI submits that there is no public interest justification for the Commission to reverse course as to that requirement, as the factual predicate for the structural separation requirement has not changed since the Commission originally adopted it. The Commission's structural separation requirement was established to protect against improper subsidization of BOC cellular services by their monopoly wireline services, to ensure equitable interconnection arrangements for competing wireless carriers, and to facilitate the detection of anticompetitive conduct by the BOCs.[2] These same essential public interest concerns continue to apply to the BOC provision of cellular service.

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[1] The Commission proposes two options in eliminating the structural separation requirement. The first option "would generally retain streamlined separate affiliate and nondiscrimination requirements of Section 22.903 for BOC provision of cellular service within the BOC's area of operation (i.e., `in-region'), but would sunset the restrictions for a particular BOC when that BOC receives authorization to provide interLATA service originating in any in-region state." NPRM at ¶ 4. The second option would "eliminate Section 22.903 immediately in favor of the uniform safeguards for LEC provision of PCS, and potentially other CMRS, proposed in Section VI of this Notice." NPRM at ¶ 5.

[2] Cellular Communications Systems, 86 FCC 2d 469, 494-95 (1981) ("Cellular Order").

The BOCs retain their monopoly control over local exchange services and will continue to do so for at least several years until the real local exchange competition contemplated by the Telecommunications Act of 1996 ("1996 Act") can materialize. Similarly, the construction, deployment and implementation of personal communications services (PCS) that provide genuine competition for the BOCs' cellular services may evolve over several years, but such competition does not exist at the present time. As a practical matter, although there is technically at least one cellular competitor in every market, the BOCs retain significant market power in the provision of cellular services. The Commission recently described the cellular market as a "duopoly" that is "highly profitable ... in large cities" and "not fully competitive,"[3] and cited approvingly the conclusions of the Department of Justice that "'cellular duopolists have substantial market power'" and that the BOCs' statements reflect a "consciousness of their own power in the marketplace.'"[4]

The absence of meaningful competition to the BOCs' cellular affiliates is illustrated by the experience of MCI Wireless, MCI's cellular resale service entity, in attempting to secure interconnection arrangements with the BOCs' and other local exchange carriers' (LECs') cellular affiliates. MCI Wireless has

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[3] Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 10 FCC Rcd. 8844, 8846, 8853, 8872 (1995).

[4] Id. at 8866-67.

found it virtually impossible to obtain such arrangements, thus precluding it from market entry on any basis other than as a "rebiller." All of the BOCs' cellular affiliates have refused interconnection for in-region resale service, some of them stating that they did so because MCI would use such interconnections to bypass their local exchange services. Such boycotting behavior would be irrational and impossible if the BOCs' cellular affiliates faced meaningful competition.

Until local exchange competition is fully developed, the BOCs will retain the ability to engage in the anticompetitive conduct that prompted the promulgation of the Commission's structural separation safeguard in the first place. Moreover, as this emerging competition is developing, the BOCs will have the incentive to engage in a variety of anticompetitive actions designed to thwart and inhibit the development of that competition, and thus the need for the Commission to retain the structural separation requirement is as compelling now as it was when originally adopted. In this light, there is no justification for the Commission to change its policy at this time.

II. THE COMMISSION SHOULD RETAIN ITS STRUCTURAL SEPARATION REQUIREMENT

The Commission decided to apply the structural separation requirement to the BOCs' provision of cellular service because of "the potential for anticompetitive abuse [by the BOCs] against cellular carriers . . . due to the BOCs' control over local

exchange facilities and, hence, control of access to the network . . . ."[5] The Commission acknowledges that this essential factual predicate for the structural separation requirement remains valid:

> although there have been vast changes in the nature of the wireless market since the 1981 imposition of our BOC cellular structural separation requirement, the market power of the BOCs in the landline local exchange and exchange access markets has remained relatively stable, and is likely to remain so until the sweeping market entry and interconnection changes authorized by the 1996 Act have taken hold.[6]

Moreover, the Commission further concludes that the BOCs "retain market power in the local exchange market, and therefore control over public switched network interconnection, within their in-region states."[7] Thus, the "wireless bottleneck"[8] remains unbroken.

Although the Commission's structural separation requirement serves in the first instance to deter BOC anticompetitive activities in the existing cellular market, it will be crucial to ensuring the development of competition in PCS services as well. As consumers are introduced to broadband PCS systems in competition with cellular operations, a truly competitive

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[5] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117, 1133, 1136 (1983) ("BOC Separation Order").

[6] NPRM at ¶ 42.

[7] Id.

[8] See United States v. Western Electric Co., 890 F. Supp. 1, 3 (D.D.C. 1995).

wireless market cannot evolve unless the Commission has the tools to detect and prevent the BOCs from leveraging their monopoly power to disadvantage their new competitors, which are several years from providing a realistic alternative to the BOCs' cellular services.

The Commission's auctions of broadband PCS licenses in the D, E, and F spectrum blocks is still underway.[9] Winners in the broadband PCS C block auction are expected to receive their licenses shortly, joining winners in the A and B block auction, who were licensed in June, 1995. Although broadband PCS A and B block licensees have held their licenses for more than one year, these entities are presently offering service in very few markets across the country and, even then, only in discrete areas without providing consumers the ability to roam. Furthermore, the costs of building microcellular systems, relocating existing microwave users in the 2 GHz band, and attracting customers to as yet geographically-limited operations means that broadband PCS systems will not be meaningful competitors to existing cellular licensees for some time.

Thus, the BOCs retain the very same ability to engage in anticompetitive conduct that the Commission has historically concluded they possess and which provides the rationale for the structural separation requirement. Moreover, each of the public interest concerns that led the Commission to adopt the requirement remain valid.

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[9] The auction began on August 26, 1996.

A. Interconnection

By virtue of their control over the local exchange bottleneck, the BOCs clearly have the ability to discriminate against their commercial mobile radio service (CMRS) competitors in providing them essential interconnection arrangements. Preventing such actions requires that the BOCs' interconnection dealings with their cellular operations be as transparent as are the BOCs' dealings with their CMRS competitors, for as the Commission notes, "[t]he effective enforcement of nondiscrimination rules depends on the visibility of the transactions under scrutiny."[10] Moreover, as the Commission admits, the existing interconnection rules are insufficient to protect against CMRS interconnection pricing discrimination.[11]

Although the Commission suggests that structural separation is not critical to such visibility,[12] it is noteworthy that the Commission for many years has believed that such visibility is possible only if structural separation exists, given the BOCs' control over the local exchange bottleneck and their capacity to discriminate against CMRS competitors. The Commission identifies no material changed circumstances that would justify a change in course now, in light of the continued inadequacy of the

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[10] NPRM at ¶ 43.

[11] Id.

[12] Id.

interconnection "safeguards," and particularly as new unaffiliated wireless entrants begin to interconnect and compete with entrenched BOCs with monopoly power in local exchange services, and face the risk that the BOCs can thwart their progress by discriminatory actions in providing them crucial interconnection arrangements.[13]

B. Price Discrimination

In the NPRM, the Commission indicates it is "concerned that the possibility of discrimination by a BOC . . . in favor of its own cellular operations and against other CMRS providers could be increased absent some form of separate subsidiary requirement . . . ."[14] MCI agrees. As the Commission correctly observes,

> integrated operations present opportunities for pricing discrimination. . . . [A]bsent separation of these activities into two corporate structures, any "charge" that a local exchange carrier places on services or facilities provided to wireless operations would be merely a bookkeeping entry, subject to the cost allocation requirements of Section 64.901 of our rules. In order to determine whether such carriers were pursuing a nondiscriminatory pricing policy, competitors and this Commission would be required to compare these cost allocations with actual charges levied on non-affiliated competitors, . . . which would be a problematic comparison, especially where allocations of joint or common costs are concerned.[15]

Since the BOCs "retain market power in the local exchange market, and therefore control over public switched network

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[13] As discussed above, MCI Wireless faces a related discrimination problem in attempting to secure interconnection agreements with the BOCs' cellular affiliates.

[14] Id. at ¶ 44.

[15] Id. at ¶ 44 (footnotes omitted).

interconnection, within their in-region states,"[16] they continue to have the ability to engage in price discrimination in favor of their own cellular operations and against their CMRS competitors. Moreover, inasmuch as the BOCs would have substantial common costs if they were to provide wireline and wireless services on an unseparated basis, the potential for improper cost shifting is especially strong. Detecting that type of discrimination in favor of BOC cellular operations would be greatly complicated without the Commission's structural separation requirement. Bookkeeping entries are difficult to police, and the greater visibility resulting from structural separation provides some deterrence to price discrimination.

C. Cross-Subsidization

Although BOCs will argue that the Commission's price cap regime leaves them little room to subsidize competitive cellular operations with monopoly wireline revenues, improper cost shifting and subsidization obviously is possible in the current system. BOCs may still elect "sharing" under the price cap regime, and unduly generous revenue cushions resulting from a lax price cap formula in given price cap service baskets present a clear opportunity to underprice more competitive offerings.[17] The BOCs' continued high earnings and their choice of the highest

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[16] Id. at ¶ 42.

[17] See Statement of Commissioner Ervin S. Duggan, Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd. 6786, 6861 (1990), recon., 6 FCC Rcd. 2637 (1991), aff'd sub nom. National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

productivity factor under price cap regulation demonstrate that price cap regulation is still too lax.[18] Moreover, as joint federal/state audits have confirmed, improper cost shifting can and does occur.[19] Price cap regulation also will have no impact on the typical subsidization situation, in which the BOC simply confers a monopoly-based benefit, such as access to customer information, on the cellular operations: There, the subsidization occurs when the benefit is conferred, irrespective of whether the BOC raises its monopoly access rates.

It should be noted that most cross-subsidization between BOC wireline and cellular services will occur on the intrastate side of the ledger, and the Commission's cost allocation and affiliate transaction rules, ARMIS reporting, and other accounting regulations therefore cannot deter the bulk of cross-subsidization that will affect cellular competition. Thus, true structural separation — as the Commission has required for years — remains a crucial tool that is available to the Commission and should continue to be used in detecting and helping to prevent improper BOC wireless cost shifting.

D. Leveraging of Market Power

The Commission acknowledges that "[o]ne concern with respect to integrated landline and cellular operations has been the

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[18] See Ex Parte letter from Bradley Stillman, CARE Coalition, to William F. Caton, Acting Secretary, FCC, CC Docket No. 94-1 (April 16, 1996).

[19] See, e.g., Ameritech, Consent Decree Order, 10 FCC Rcd 13846, 13866-68 (1995).

incentives and opportunities such a corporate culture provides for leveraging of the LECs' local exchange market power into the more competitive cellular and, more generally, CMRS market."[20] Crucially, the Commission acknowledges that

> a BOC which integrated a well-established incumbent wireless provider into its landline management and operations could possess incentives and opportunities to favor its own wireless operations while at the same time providing essential services and facilities to its cellular system's potential competitors. We are concerned about the potential for abuses in provisioning, installation, maintenance and customer network design that might not be addressed adequately by the uniform nonstructural safeguards that we propose . . . .[21]

The Commission also concedes that "because PCS is likely to be competitive with both landline local exchange and incumbent cellular service, an integrated double incumbency (BOC cellular and local exchange operations) would appear to increase the incentives and the opportunities for the BOC to act in an anticompetitive manner."[22] Accordingly, the Commission reasons that

> [s]tructural separation, if continued on an interim basis, could prevent, for example, the BOC from tasking a single set of officers and personnel with the interconnection arrangements for its cellular unit's PCS competitor as well as dealings with that competitor's major customers to provide local exchange service, or cellular service, or both. The nonstructural safeguards we propose below in Section VI would not prevent such

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[20] NPRM at ¶ 47.

[21] Id. at ¶ 48.

[22] Id. at ¶ 49.

sharing of personnel and integrated management decision making.[23]

MCI believes that such administrative and operational separation is crucial. The Commission's separate subsidiary requirement is indeed increasingly important as PCS services that will compete with existing cellular operations are gradually introduced into the marketplace. Given their control of the local exchange bottleneck and their market share in existing cellular services, BOCs with combined local exchange and cellular operations thus have the clear-cut capacity to leverage their "double incumbency" market power in an anticompetitive manner to undercut the efforts of their nascent PCS competitors. The structural separation requirement — which provides visibility and transparency to the BOCs' operations — at least can assist the Commission's efforts in preventing such monopoly leveraging.

Thus, each of the four considerations that led to the imposition of the cellular separation rules still obtains and requires continuation of such requirements.

E. There is No Rational Basis for the Elimination of the Structural Separation Requirements

In considering whether to eliminate the structural separation requirement as it proposes, the Commission must satisfy the admonition of the courts that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an

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[23] Id.